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Symposium
The Initiative Process in Washington: Implications and Effects

DIRECT DEMOCRACY IS NOT REPUBLICAN GOVERNMENT

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I. Introduction

The date is November 7, 1922, and the people of the great State of Oregon are going to the polls. On the ballot is the Compulsory Education Bill, which reads as follows: Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over . . . who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor.

This proposed bill was submitted to a vote by the people under the initiative provision of the Oregon Constitution and passed by a vote of 115,506 to 103,685. The bill never became law, however, because an injunction, approved by the Oregon Supreme Court, prevented it from taking effect. On appeal, the United States Supreme Court upheld the injunction in a case now famous for holding that a person has a fundamental liberty interest in determining where to educate his or her children.

Although it was ignored in the United States Supreme Court decision, the case involved another important issue: the initiative process itself. The law itself was passed in violation of the Guarantee Clause of the United States Constitution.

The Court was correct in striking down the Oregon Compulsory Education Act, but it could have held the initiative process that produced the law unconstitutional as well. The United States Supreme Court declined to take this step, however, because in an earlier case, Pacific States Telegraph & Telephone Co. v. Oregon, it held that the issue was a political question. Nevertheless, state courts are not bound by this holding because the Supreme Court dismissed the Pacific States case for lack of jurisdiction.

This Article will initially explain the examples of direct democracy in the states of Washington and Oregon. It will then analyze the United States Constitution's Guarantee Clause. Finally, this Article will argue that state initiative and referendum provisions are inconsistent with a republican form of government and that laws passed through the use of this process are unconstitutional.

II. Washington State Constitutional Provisions Permitting Direct Democracy

As originally adopted, the Washington State Constitution did not provide for an initiative or a referendum. The constitution that enabled Washington to become a state, approved by Congress in 1891, stated, '[t]he legislative powers shall be vested in a Senate and House of Representatives, which shall be called the legislature of the State of Washington.'

Whether the state government was republican in form was of obvious concern to the United States. As the proclamation by then President Harrison announcing Washington's statehood declared, 'whereas it was provided by said act that the [[Washington] Constitution so adopted should be republican in form . . . . ' At that time, Washington's constitution was indeed republican in form. People elected representatives to make political decisions for them.

This representative form of government was altered twenty years later to include direct government by the people when an amendment was adopted in 1911, adding to the legislative powers the phrase,

but the people reserve to themselves the power to propose bills, laws and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the legislature.

Following the procedure for constitutional amendments, the requisite majority of the voters approved the amendment. The 1911 amendment required ten percent of the legal voters, but not more than 50,000, to sign a petition before an initiative could be put before the people. In 1956, Amendment 30 changed this to eight percent of the number of people voting for the office of governor at the last preceding regular gubernatorial election. Once placed on the ballot, a simple majority is needed to make an initiative a law.

These provisions have allowed many laws to be passed in the State of Washington. Recently, in the 1998 election, Initiative 200 banned affirmative action, Initiative 692 allowed the use of medical marijuana, and Initiative 688 raised the minimum wage. Measures that did not pass include Initiative 694, which would have restricted abortion rights; Initiative 173, which would have provided scholarship vouchers; and Initiative 670, which would have established congressional term limits.

While the initiative is the most common form of direct democracy, it is not the only form allowed in Washington. The referendum is also permitted, whereby any law passed by the legislature may be submitted to the people for approval. The provision for a referendum in Washington was first enacted along with the initiative provision in 1911. Either the people or the legislature may call for a referendum. Initially, six percent and not more than 30,000 of the legal voters were required to sign and make a valid referendum petition. Ultimately, the percentage of voters necessary for a referendum dropped to only four percent. If the legislature declares an emergency, then the people have no right to a referendum. The voters must be sent a voter's pamphlet describing the proposed laws. The final example of direct democracy in the State of Washington is the provision allowing for the recall of elected officials, including the Governor.

III. The Oregon System

Oregon's Constitution is similar to Washington's in that it originally did not provide for an initiative or a referendum. When Congress approved Oregon's Constitution in

1859, it stated, 'Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form . . . .' In June of 1902, however, an amendment was approved that gave the people the right to file initiatives and referendums. The Oregon Constitution was amended to read, 'The people reserve for themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the legislative assembly.'

At present, out of the total number of votes cast for all candidates for the current governor, six percent is needed for an initiative to be placed on the ballot and eight percent is needed for an initiative proposing an amendment to the constitution. The referendum power was also reserved to the people by the 1902 amendment. Any act that does not 'declare an emergency' may be subject to the referendum. Of the votes cast, four percent is needed to call a referendum. A referendum may also be called by the legislature itself. Either way, no referendum is subject to the Governor's veto power. As of 1998, there have been 288 initiatives in Oregon, ninety-nine of which have passed. The legislature has referred 363 measures to the people and 206 have been approved.

Oregon has passed some groundbreaking legislation through the initiative process. For example, the Oregon Right to Die measure, the only such state law in the nation, was passed by initiative in 1994. Term limits passed as an initiative by a vote of 1,003,706 to 439,694. Another groundbreaking initiative was put on the ballot in 1992; measure 9, a bill that would have required the state government to discourage homosexuality, was defeated 56.5% to 43.5%.

IV. Direct Democracy Is Not Republican Government

John Stuart Mill writes that the ideal form of government is a representative democracy. He states that 'since all cannot, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative.'

The processes of representative government are invaluable because of the extra deliberation they provide. A bill becomes a law within the republican processes by first being introduced on the floor of either the state House of Representatives or the state Senate. Before a bill is introduced in the legislature, however, offices such as the Oregon Legislative Counsel Committee, the Senate Committee Services, or the House of Representatives Office of Program Research of the State of Washington probably draft it. These state government offices are comprised of attorneys and staff who draft measures for legislators and legislative committees. Proper drafting is vital to successful lawmaking.

Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and citizens with an earnest desire to conform to them are confused. Often, a lack of artful drafting results in the statute's failure to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity.

A very good example of a badly drafted initiative is Washington's Initiative 695, which led to the recent case of Amalgamated Transit Union Local 587 v. State. The King County Superior Court held Initiative 695 unconstitutional under Article II, section 1(b), Article II, section 19, and Article II, section 37 of the Washington State Constitution, striking down the initiative in its entirety. This decision was upheld by the Supreme Court of Washington.

A properly drafted bill is introduced into either the House or the Senate. Once introduced, the bill is sent to the appropriate committee, which reviews the bill. The committee may also hold hearings. At a hearing, all interested parties may offer suggestions, advice, and comments. The committee may then choose to approve the bill, reject the bill, not review the bill, or table the bill, thereby destroying it. If the bill is

approved, the entire House of Representatives votes on it. At this point, the bill can be approved, rejected, or sent back to committee. If the bill is approved, it is then sent to the Senate, where the process of committee hearings and possible approval or rejection occurs once again.

During this process, attorneys from various state offices may be consulted and even asked to appear to testify before a committee or the entire House or Senate. At the same time, news reporters broadcast the latest developments to all interested listeners, and feedback comes into the offices of Representatives and Senators. The bill may be amended at various points in the process. Even if both houses of the legislature approve the bill, the governor's veto power may kill it. This process is consistent in both Oregon and Washington.

The initiative process, on the other hand, provides for only one step of the republican form of government, the initial bill drafting stage. In Washington, the Code Reviser reviews the draft of an initiative for technical errors and style, advising the sponsor of any potential conflicts with existing statutes. In Oregon, the sponsors may obtain a manual by calling the Legislative Counsel's Office. If fifty legislators petition to have the proposed initiative examined by the Legislative Counsel's Office, the attorneys of that office will review the proposed bill. While the drafting of the proposed initiative may be somewhat improved, the lack of amendments, compromise, and broad input may lead to bad laws that tear at the fabric of society. The forces that may exert such a strong influence on society are, in James Madison's words, factions.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.

The Oregon Citizens Alliance (OCA) would be classified as a faction. In 1992, the OCA sponsored and campaigned for Measure 9, an initiative that would have required the State of Oregon to discourage homosexuality. The bill was eventually defeated. Like the Compulsory Education Bill, however, Measure 9 demonstrated that the threat of passion-based laws looms with the initiative process.

In response to Measure 9, Hans Linde, a Justice on the Oregon Supreme Court from 1977 to 1990, suggested that there are five types of initiatives that are unconstitutional. Justice Linde's categories resemble Madison's fears, pointing out that certain types of initiatives promote social conflict with laws that curtail some groups' liberties. His categories can be summarized into two groups: (1) initiatives that appeal to majority emotions to impose values and target a group of individuals, and (2) initiatives that place affirmative legislation into the constitution itself.

The first group of initiatives recognizes that some people, motivated by passion, might restrict the liberty of others. The technical language of this type of initiative frequently confuses voters. Furthermore, voters may acquaint themselves with the initiative by relying upon only a few sources of information, rarely discussing the issues with other citizens. For example, an initiative may propose a tax cut, giving little or no consideration to whether the budget can afford it. The fate of the initiative also rests largely on how much money is spent on the proposal, either for or against it. Very often, the outcome of an initiative has little to do with the best interests of the citizens of a state; rather, it instead satisfies the narrow interests of a selected few.

The second group of initiatives is unconstitutional because initiatives that amend the constitution make it very difficult, if not impossible, for the Oregon judiciary to strike down the measure once it becomes law. This issue, unique to Oregon, arises from the fact that in that state, the initiative process can be used to amend the constitution. Whether the legislature may repeal an initiative-created amendment is an undecided issue. If the people amend the constitution, it appears that the legislature would have to amend that amendment in order to prevent the initiative from taking effect. That would mean using the process of Article XVII, section 1, which requires a majority of the legislators in the House of Representatives and then again in the Senate to approve the amendment. The bill would then have to be submitted to the people, who would vote on

the legislature's amendment rejecting their earlier amendment. The complexities of this remedy are obvious.

A. State Courts Are Reluctant to Invalidate Direct Democracy

Courts have consistently refused to use the Guarantee Clause to prohibit direct democracy. In the State of Washington, two recently reported cases have dealt directly with the issue of whether direct democracy is unconstitutional. In State v. Manussier, a convicted criminal challenged the 'three strikes you're out' law that was passed by initiative. Manussier argued that the Guarantee Clause is 'absolutely incompatible with direct democracy as embodied in the recall, referendum, and initiative schemes . . . .' The court concluded that the argument did 'not satisfactorily address the power of the court to decide an otherwise political or governmental issue.'

Yet, afterwards, the court simply stated, 'We find appellant's argument on the violation of the United States Constitution Art. IV, section 4 without merit.' The dismissal of the argument was a statement of dicta. The court expressly declined to rule on the Guarantee Clause issue in Manussier. The court asked for more authority to rule on the issue because, 'as the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress . . . . ' If the courts could be persuaded that this is not a political question, they might yet rule on this important constitutional issue.

The most recent Washington case, State v. Smith, comes from Division I of the Washington Court of Appeals. In that case, the court stated that 'any challenge to the [three strikes you're out law] based on the Guarantee Clause would be frivolous because courts have found it to be a nonjustifiable [sic] political question, and furthermore, courts that have treated the issue as justiciable have uniformly rejected the contention that use of the initiative process is inconsistent with the 'republican form of government." This case did not cite to any authority, but it seems to have misinterpreted Manussier.

Oregon courts have reacted similarly when considering the Guarantee Clause issue. In the latest case, a court found that the issue was not properly briefed, but it still stated in dicta that it was unpersuaded by the arguments that were presented. The court stated,

a challenge to a particular initiative measure under the Guarantee Clause obviously involves extremely important as well as difficult questions. . . . It would require extensive briefing of the origins, the historic concerns and the drafter's political theories underlying the Guarantee Clause, and how they might bear on the particular measure at issue.

B. Legislators Are Better Than 'The People' at Making Law

In The Spirit of the Laws, Montesquieu wrote,

> *One great fault there was in most of the ancient republics; that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no hand in the government but for the choosing of representatives, which is within their reach.*

The great advantage of representatives is their being capable of discussing affairs. For this the people collectively are extremely unfit, which is one of the greatest inconveniences of a democracy.

Legislators are better than the people at drafting laws because they are held accountable for their actions; the people are immune from direct consequences, and their motivations are different. There is a record of whether and how a legislator voted. Legislators weigh decisions carefully because they know there will be consequences when

voting for or against a particular bill. The legislator who does not get a majority of the votes in the next election will not be a legislator anymore. The people have no such immediate consequence to their voting.

Legislators' motivations are also better suited to producing better laws. Their decisions are usually based on what will influence a majority of the people in their districts to re-elect them. Thus, the self-interest of legislators is turned to the advantage of a majority of the people. The people themselves are also obviously self-interested. However, an individual's self-interest does not consider the majority opinion of the district that he or she resides in. Such self-interest probably extends no further than the boundaries of the individual's property or that of his or her family and friends. Therefore, while representatives attempt to please a majority of the county, city, state, nation, etc., individuals are more likely to please themselves. While representative government helps society progress as a whole, a pure democracy helps each individual progress alone.

C. Political Question Doctrine Does Not Deny Jurisdiction

The nonjusticiable political question doctrine in America has its roots in an 1849 case where the Supreme Court was asked to decide which of two rival governments was the legitimate government of Rhode Island. The Court held that 'it rest[s] with Congress,' not the judiciary, 'to decide what government is the established one in a state.' The Court held that it is Congress' prerogative to rule on whether a state has violated the Guarantee Clause. The Court stated,

when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

The Court did state that one type of government, a military government, would be unacceptable. Yet, it would still 'be the duty of Congress to overthrow it.' Such an extreme action of 'overthrowing' has, of course, never occurred in the history of this nation. However, during the post-Civil War period of the Reconstruction, when the former Confederate states had to be formally readmitted to the Union, Congress refused to grant acceptance to the all-white delegation of the State of South Carolina because the state did not grant African-Americans the right to vote.

The remedy of 'overthrowing' a state government seems not only implausible today, but also unrealistic and impractical. More recent cases should, therefore, be used to interpret the political question doctrine. A controversy is a nonjusticiable political question when there is a 'textually demonstrable constitutional commitment of issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for the resolving controversy.

In defining what constitutes a political question, Washington case law is similar to federal case law. In Washington, there is a political question 'in so far as questions of fact are involved, and that the courts have jurisdiction over it only in so far as statute or written constitutional law prescribes.

The Guarantee Clause is not committed textually to a coordinate branch of government and is not barren of judicially discoverable or manageable standards. The words of the Guarantee Clause are, 'The United States shall guarantee to Every State in this Union a Republican Form of Government . . . . ' The section is not listed under the legislative powers that are spelled out in Article I of the Constitution. Under Article IV, Section 3, it states that, 'New States may be admitted by the Congress into this Union. . . .' Yet, the words of the Guarantee Clause state that the 'United States,' not just Congress, shall guarantee. In comparison, the Washington State Supreme Court has interpreted the word 'state' to include the judiciary and not just the legislature. The use of the words 'shall guarantee' means that the provision is mandatory. Furthermore, the phrase 'a Republican form of government' is the phrase that offers judicially discoverable and manageable standards.

The plain meaning of 'republican' can be derived from any basic government textbook for high school students. The distinction is between a 'direct' and an 'indirect' democracy. An indirect democracy is where 'the people elect representatives to make political decisions for them.' A direct democracy is where 'all citizens take part in decision making.' An indirect democracy is also known as a republic.

The kind of republic that James Madison described was very specific. 'The elective mode of obtaining rulers is the characteristic policy of republican government.' A republic, by which I mean a Government in which the scheme of representation takes place . . . . Where the people fit in the government is as the electors of the representatives. Who are the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune . . . . The electors are the great body of the people of the United States.

Madison not only conceived of the United States as a republic, he also warned of the dangers of a pure democracy. He stated, a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure of the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

D. Declining Voter Participation Decreases Direct Democracy's Legitimacy

With declining voter participation, the legitimacy of the initiative process is further diminished. In 1996, Oregon's voting-age population was 2,396,000. The percentage of the voting-age population casting votes in the 1992 presidential election was 65.9%. In 1996, the percentage dropped to 48.0%. The percentage of the voting population casting votes for U.S. Representatives during the nonpresidential election year of 1994 was only 26.3%. The Right to Die Initiative passed with a majority of only 627,980 votes in a state with a population of 3,082,000. In the 1996 election, to attain a majority sufficient to pass an initiative, all that was needed were the number of registered voters in Multnomah and Washington Counties, two of the three counties that make up the Portland metropolitan area.

In contrast to the initiative process, to attain a majority within the republican processes in Oregon, a sponsor must gain the support of thirty-one of the sixty members of the House of Representatives, sixteen of the thirty members of the Senate, and the Governor. As only twenty-one Representatives' Districts make up the Portland Metropolitan area, to pass a bill beyond the House and gain a majority, a sponsor must get the support of these districts, perhaps all of the five districts that represent the Oregon Coast, and the Representatives for the districts of the towns of Eugene and Salem as well. Because only twelve Senate Districts make up the entire Portland area, a sponsor would need those Senators and the support of four Senators from other districts in order to pass a bill. Finally, the Governor's signature is necessary to make a bill into law. Deliberative legislative processes such as these provide the cure for the initiative process, which allows only two counties of the three that make up the Portland metropolitan area to determine the law for the entire State of Oregon.

In Washington, the estimated voting-age population in 1998 was 4,257,000. Of that number 3,199,562 were registered voters. In the 1998 election 1,939,421 votes were cast. That means 62.17% of registered voters voted and 45.56% of the voting-age population voted. This election banned affirmative action (Initiative 200), legalized the use of medical marijuana (Initiative 692), and raised the minimum wage (Initiative 688). In this election, once the petitioners garnered the 179,248 valid signatures necessary to put these initiatives on the ballot, only 969,711 people needed to vote for the initiatives to make them the law for all the people in the State of Washington. This means that the registered voters of King County alone can pass laws governing the approximately

5,610,000 people in the entire state. This presents the risk of precisely the minority factionalization that Madison wrote was the destroyer of democracies. It is also a clear indication of voter apathy creating a situation where a focused faction could, if the true majority did not rally, enact harmful legislation through the initiative process.

E. Initiatives Cannot Easily Be Repealed by Legislatures

It is more difficult to repeal a law through the legislative process than it is to approve a law via initiative. In Washington, for example, if the legislature wished to repeal the medical marijuana initiative, it would have to go through all the steps of the parliamentary processes outlined above. In the House of Representatives, fifty representatives would have to support the repealing bill; this would mean all of the representatives for King County and thirty other representatives. Further, the Senate would have to equally unite to form a majority of thirty. The governor would then have to approve the bill's repeal.

Further, it is politically problematic for the legislature to question the voters' intent by attempting to overturn an initiative. If the majority of the voters in the latest election approved a measure, it would seem very unresponsive of the legislators to ignore the vote and strike down the will of the people.

This shows how much more difficult it is to enact laws through the parliamentary processes of republican government as opposed to the processes of direct democracy via initiatives. It strongly counters the argument that the legislature can simply repeal or amend measures passed by the people. In Oregon especially, for the legislature to effectively repeal a constitutional amendment enacted by initiative, the people would have to reject it after its initial passage. This is because all constitutional amendments must be approved by a majority of the voters.

The framers of the Constitution intended that passing laws be difficult, because the process makes it more of a challenge to pass laws that restrain liberty. In other words, gridlock preserves liberty by allowing only laws that a majority of representatives approve to be enacted. The framers of the Constitution did not envision a direct democracy within this republic; rather, they envisioned a representative form of government. Their aim was to prevent factions within citizen groups that have the power to make hasty and passion-based laws that are more difficult to repeal than to enact.

V. Conclusion

While direct democracy has been a part of the legislative landscape in the states of Washington and Oregon for almost one hundred years, and while the process has been used to enact laws such as the Compulsory Education Act of 1922, the judiciary has not properly interpreted the Guarantee Clause within the plain meaning or intent of the Constitution's drafters. There is a textually demonstrable clause that requires a certain form of government in the states. The framers chose this form of government because there are advantages to its parliamentary procedures, as well as to the checks and balances included within those procedures, guaranteeing citizens the liberty that is embodied in the rest of the Constitution. Bypassing the process of the legislature makes for laws that are ambiguous, divisive, and reliant upon passion rather than reason. The state courts of Oregon and Washington should bravely admit that while direct democracy is popular, it is a dangerous method of lawmaking, and it is unconstitutional.

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